No: 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1900.

SINCLAIR REFINING COMPANY,

*Petitioner,*

vs.

S. KRIETE OSBORN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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SINCLAIR REFINING COMPANY,

*Petitioner,*

*v.*

S. KRIETE OSBORN,

*Respondent,*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 11, 1960, rehearing denied February 28, 1961.

### Citations to Opinions Below.

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 3a, is reported in 171 F. Supp. 37. The opinion of the Court of Appeals as amended after consideration of the Petition for Rehearing, together with the disposition of that Petition, printed in Appendix B hereto, *infra*, p. 33a, is reported in 286 F. 2d 832. The original opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 19a, is unreported.

## Jurisdiction.

The Judgment of the Court of Appeals was entered on July 11, 1960. (Appendix B, p. 49a, *infra*) A timely Petition for Rehearing was denied on February 28, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## Questions Presented.

Prior decisions of this Court have established that tying agreements are illegal *per se* under the Sherman Act if (1) the seller possesses "sufficient economic power" in the market for the tying product to appreciably restrain commerce in the market for the tied product, and (2) a not insubstantial amount of commerce in the tied product is thereby foreclosed. The questions presented are:

1. Whether the requisite "economic power" is conclusively established as a matter of law merely by showing that the seller's share of the market for the tying article in Maryland is approximately 10%, thus precluding the seller from demonstrating the absence of such power as a matter of fact.

2. Whether substantial foreclosure of commerce in the tied product can be established automatically by the seller's annual volume of sales of that product to purchasers of the tying article, even though

(a) the portion of that volume attributable to the claimed tie-in, rather than to the free choice of customers, is not shown; and

(b) the entire volume is an insignificant portion of the total business done in the tied product by all sellers in the relevant geographic market.

3. Whether a *per se* Sherman Act test can, under any circumstances, be applied to a "tie-in" which admittedly imposes no exclusive dealing requirement on the buyer, but assertedly conditions the sale of the tying article on the purchase of an indeterminate "substantial" quantity of the tied product.

## Statutes Involved.

The statutes involved (set forth in Appendix A, *infra*) are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. Sections 1 and 2; and Sections 3 and 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Sections 14 and 15.

## Statement of the Case.

Petitioner, Sinclair Refining Company ("Sinclair"), is a producer and distributor of petroleum products in interstate commerce. It sells to various outlets, including service station dealers, some of whom lease their stations from Sinclair. (R. 17, 20)* In Maryland, Sinclair operates through its Sherwood Division ("Sherwood").[1] Among Sherwood's lessee-dealers in Maryland was respondent, S. Kriete Osborn ("Osborn"). In 1956, Sinclair accounted for about 10% of total Maryland gasoline sales, and sold through more than 10% of the total number of service stations in that state. (R. 17-18)

In order to furnish "one-stop service" to their customers, service stations offer for sale—in addition to petro-

* As used in this Petition, "R." refers to the appendix record below (Vol. I of the Transcript of Record certified to this Court), and "Tr." refers to the stenographic transcript.

[1] Sales by Sinclair in Maryland, at all pertinent times prior to January 1, 1956, were effected through Sherwood Brothers, Inc., Sinclair's wholly-owned subsidiary. On December 30, 1955, Sherwood Brothers, Inc. was merged into Sinclair. It has since continued to perform its functions as an operating division. (R. 17)

leum products—tires, batteries and automotive accessories, known as "TBA". (R. 42) A number of TBA suppliers, including Goodyear Tire and Rubber Company ("Goodyear"), ship their wares into Maryland for resale. (R. 28, 74) Since 1944, Sinclair has been a party to written marketing arrangements with Goodyear which afford Sinclair dealers ready access to Goodyear's nationally advertised and best selling TBA. (R. 42) Sinclair's sales force promoted dealer purchases of Goodyear TBA under these arrangements, and Sinclair derived a gross profit of 10% or less from sales of such TBA to Sinclair outlets. (R. 21-24) Annual sales of Goodyear TBA to Sinclair's Maryland dealers averaged approximately $800,000. (R. 29)

Osborn's service station lease ran from year to year and was terminable by either party upon thirty days' notice prior to the end of any annual term. (R. 19) It was first entered into in 1936 (R. 18), and was renewed each year until 1956, when it was cancelled by Sinclair. The cancellation occurred, according to the District Judge, because both Osborn's gasoline sales and his Goodyear TBA purchases (which were less than one-tenth of his purchases of Firestone TBA)[2] were deemed too low. (R. 38-39) The District Judge further found (R. 38-39), and the Court of Appeals agreed (Appendix B, pp. 34a, 39a, *infra*), that neither of these reasons was more important than the other in the decision to cancel Osborn's lease.

Osborn, claiming that the cancellation stemmed from an antitrust violation and that he was injured thereby, brought

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[2] Osborn had always sold much larger quantities of Firestone than Goodyear TBA. Steps were taken in 1948 to cancel his lease for both gasoline and TBA reasons. However, after a meeting between Osborn and Sherwood personnel, Osborn ordered some Goodyear TBA and his lease was renewed. Thereafter, Osborn continued to buy more than ten times as much Firestone as Goodyear TBA. (Appendix B, pp. 12a-13a, *infra*)

this treble damage action against Sinclair under Section 4 of the Clayton Act. The District Court's jurisdiction was invoked because the case arises under laws relating to commerce: the Sherman and Clayton Acts.

Osborn originally charged Sinclair with three distinct antitrust infractions:

> (1) Conspiring or contracting with Goodyear to restrain commerce in TBA—in violation of Section 1 of the Sherman Act;
>
> (2) Monopolizing, or attempting to monopolize, commerce in TBA in a "market" composed of Sinclair's Maryland service station dealers—in violation of Section 2 of the Sherman Act[3]; and
>
> (3) Engaging in illegal tie-in transactions, namely, agreements between Sinclair and its dealers conditioning the sale of Sinclair petroleum products and the leasing of Sinclair service stations (the "tying articles") on the purchase of Goodyear TBA (the "tied article") to the exclusion of competing TBA brands—in violation of Section 3 of the Clayton Act.

At the close of the plaintiff's case, however, Osborn abandoned the third of these claims (Tr. 895-97), and Sinclair focused its defense on the first two, which Osborn continued to press. As the trial judge observed in his opinion, "plaintiff concedes that he has not proved a tying arrangement which violates sec. 3 of the Clayton Act." (Appendix B, p. 15a, *infra*)[4] Hence, the District Court

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[3] The complaint did not at the outset contain any specific reference to Section 2 of the Sherman Act. However, it was amended at the trial to include a reference to Section 2. (Tr. 17-19, 895-97)

[4] This Court has made it clear that tying arrangements are more readily invalidated under Section 3 of the Clayton Act than under Section 1 of the Sherman Act. *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (1953); *Northern Pac. Ry.* v. *United States*, 356 U. S. 1 (1958).

never passed upon the theory of tie-in which Osborn had initially proffered.[5] That Court's detailed and comprehensive findings of fact and opinion include no finding as to the existence of a tie-in, as to sufficient economic power, or as to substantiality of foreclosure. Indeed, neither party requested any findings on these issues. The District Judge held that Sinclair and Goodyear had neither contracted nor conspired to restrain trade in TBA, and that Sinclair had not been guilty of any attempt to monopolize. (Appendix B, pp. 17a-18a, *infra;* R. 43) Accordingly, judgment was rendered for the defendant. (Appendix B, p. 18a, *infra*)

The Court of Appeals did not disturb the District Court's conclusions that there had been no unlawful conspiracy, contract or attempt to monopolize. (Appendix B, p. 36a, *infra*) But it regarded these conclusions as "beside the point." (Appendix B, p. 45a, *infra*) Despite Osborn's abandonment of his claim of tie-in under the less demanding requirements of the Clayton Act, the Court of Appeals disposed of the case as if the issue were "whether there existed between the Sinclair Refining Company and its customers an illegal tying arrangement prohibited by Section 1 of the Sherman Act . . .". (Appendix B, p. 34a, *infra*) Ostensibly applying this Court's decision in *Northern Pac. Ry.* v. *United States*, 356 U. S. 1 (1958), the Court of Appeals sought to coax from the record the elements necessary to establish a *per se* violation of the Sherman Act.

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[5] In his opinion, the District Court summarized Osborn's claims as follows:

> "Plaintiff claims that his service station lease and dealer's sales agreement were cancelled by defendant . . . in furtherance of an attempt by Sinclair to monopolize the sale of [TBA] . . to its service station dealers in Maryland and/or a combination or conspiracy between Sinclair and Goodyear . . . to restrain trade in those products." (Appendix B, p. 3a, *infra*)

The first problem which confronted the Court below was to find a tie-in. Unlike the situation in the typical tie-in case,[6] there were no written agreements requiring the purchase of one product in order to get another. (Appendix B, p. 15a, *infra*) What the Court of Appeals did was to infer the existence of tacit understandings between Sherwood and its dealers[7]. Even here, however, the Court conceded that there was no agreement, even of an implied nature, that Goodyear TBA would be purchased to the exclusion of competing brands. Rather, it found that Sherwood's dealers were given to understand that their dealerships might not be renewed if they did not purchase "substantial" quantities of Goodyear TBA. In point of fact, no Sinclair dealer handled the Goodyear line exclusively. (R. 30, 43) While the Court of Appeals recognized that it was pioneering (Appendix B, p. 41a, *infra*), it held that exclusivity was not an integral element of a tie-in susceptible of *per se* treatment under *Northern Pacific*.

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[6] *E.g., Jerrold Electronics Corp.* v. *United States*, 365 U. S. 567 (1961), *affirming* 187 F. Supp. 545 (E. D. Pa. 1960); *Northern Pac. Ry.* v. *United States*, 356 U. S. 1 (1958); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Mach. Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Mach. Corp.* v. *United States*, 258 U. S. 451 (1922).

[7] This inference was chiefly founded upon a speech made by the President of Sinclair's Sherwood subsidiary at an annual meeting of dealers held seven years prior to the cancellation of Osborn's lease, which suggested that some leases might be terminated for TBA reasons. (Appendix B, p. 38a, *infra*) The Court of Appeals also relied on the 1948 lease renewal incident between Osborn and Sinclair (see note 2, *supra*). There are 321 Sinclair stations in Maryland (R. 17-18), but Osborn offered no proof, and neither of the courts below made any finding, that Sinclair ever refused to deal with anyone except Osborn because of insufficient TBA purchases. There was no separate consideration by the Court of Appeals of any evidence indicating the existence of an implied tie-in arrangement with any one of the 321 dealers other than Osborn. In other words, the Court of Appeals never documented its assumption that there was a statewide tie-in.

Having thus found a "tie-in", albeit a non-exclusive one, the Court of Appeals next had to find that Sinclair possessed sufficient economic power over the tying article to produce an appreciable restraint. For this, the Court relied solely on the fact that Sinclair accounted for more than 10% of gasoline sales and sold through more than 10% of the service stations in Maryland. (Appendix B, pp. 42a, 47a, *infra*) Nothing else mattered.

Finally, on the assumption that Sinclair had imposed such a tie-in upon all of its Maryland dealers, the Court of Appeals held that a not insubstantial amount of commerce in TBA had been foreclosed—without determining the extent to which the Goodyear TBA purchases by Sinclair dealers were the product of a tie-in rather than genuine dealer preference, and without any inquiry as to the substantiality of the alleged foreclosure in terms of the total market for TBA.

In this way, the Court of Appeals concluded that Sinclair had violated the Sherman Act. It remanded the case to the District Court for determination of the amount of damages to which Osborn was entitled. Sinclair's Petition for Rehearing was denied by the Court of Appeals in a brief addendum to its opinion.

## Reasons for Granting the Writ.

A. The Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court, and has decided other important questions of federal law which have not been, but should be, settled by this Court.

Inasmuch as there was no factual showing at the trial that the conduct of Sinclair actually resulted in an unrea-

sonable restraint of trade, the Court of Appeals implicitly recognized that the judgment would have to be affirmed if the Sherman Act's rule of reason were applicable. It was only by treating the case as if it involved a restraint of the illegal *per se* variety, that the Court below found a way to reverse. In so doing, it committed two fundamental errors.

First, it rendered meaningless this Court's formulation in *Northern Pacific* of the conditions precedent to holding a tie-in unlawful *per se*, namely, sufficient economic power and substantiality of foreclosure.

Second, the Court of Appeals purported to apply the *per se* rules of *Northern Pacific* to an implied restraint which concededly imposed no requirement on the buyer to refrain from dealing in competing wares.

These rulings, if permitted to stand, portend the most serious consequences for any trader who regularly sells more than one product to his customers.

1. In *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 608-09 (1953),[8] this Court synthesized the law governing tie-ins. If attacked under Section 1 of the Sherman Act, tie-ins were unlawful *per se* only if two elements were established: (1) the seller's monopolistic position in the market for the tying article; and (2) the foreclosure of competitors from a substantial volume of commerce in the tied article.[8] *Northern Pacific* thereafter reaffirmed *Times-Picayune* after restating the first of its conditions precedent in terms of "sufficient economic power" in the market for

[8] Proof of either of these elements sufficed to establish a violation of the Clayton Act. 345 U. S. at 608-09.

the tying article to appreciably restrain commerce in the tied article. 356 U. S. at 6.

The issue of sufficient economic power was thus summarily dealt with in the Court of Appeals' Amended Opinion:

> "The facts as found by the District Court make it clear that the power of Sinclair to appreciably restrain competition in TBA stemmed from Sinclair's position as supplier of more than 10% of the gasoline sold in the state of Maryland, and as gasoline supplier to more than 10% of the stations in the state, including the station leased to Osborn." (Appendix B, p. 42a, *infra*)"

*The "facts as found," to which the Court of Appeals referred, include only the mute fractions set forth in its own statement. No other fact in the record tends to establish the requisite economic power.* In every other case in which this Court condemned a tie-in, either the seller's dominance or the presence of unique elements or advantages in its tying article provided the leverage for inducing acceptance of the tied product.[10] Here, on the other hand,

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[9] The Court of Appeals had originally written that:

"It is not disputed in the present case that Sinclair, with more than 10% of the gasoline sales and stations in the State of Maryland, has sufficient power in the tying product to appreciably restrain competition in the tied product, TBA." (Appendix B, p. 28a, *infra*)

The amended version was adopted after Sinclair's Petition for Rehearing had pointed out that the issue of sufficient economic power had not been litigated in view of Osborn's abandonment of the tie-in claim, and hence there had never been any occasion for dispute on this issue. (Certified Transcript of Record, Vol. II, p. 30)

[10] In *Jerrold Electronics Corp.* v. *United States*, 356 U. S. 567 (1961), *affirming* 187 F. Supp. 545 (E. D. Pa. 1960); *International Business Mach. Corp.* v. *United States*, 298 U. S. 131 (1936); and *United Shoe Mach. Corp.* v. *United States*, 258 U. S. 451 (1922), the sellers occupied a monopolistic or dominant position in respect of

there was no suggestion that Sinclair gasoline was especially sought after by consumers or that the service stations leased by Sinclair occupied strategic locations. There was not even any finding as to how many of the stations which handled Sinclair products were under lease from Sinclair, how many were leased from third parties, or how many were independently owned. In any event, the mere fact that some of the dealers were lessees of Sinclair cannot serve to establish sufficient economic power in view of the District Court's unchallenged finding that

> "At all times pertinent in this case, experienced and efficient service station operators were greatly in demand, and the number of such experienced and efficient operators available was substantially less than the number of stations available. All major Oil Companies were in active competition to obtain the services of experienced and efficient service station operators." (R. 45)[11]

The Court of Appeals thus has clearly held that sufficient economic power is shown by the naked fact that the seller accounts for approximately 10% of the sales of the alleged tying article in the claimed relevant geographical market. What is more, the Court viewed this solitary statistic as conclusive on the question, so as to preclude the seller

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the tying articles; in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), the tying articles were patented machines; and in *Northern Pac. Ry.* v. *United States*, 356 U. S. 1 (1958), the seller's leverage was conferred by checkerboard ownership of millions of acres of land located strategically along the Northern Pacific's right of way, thus enabling it to exact tie-in clauses in well over a thousand leases and sales contracts.

[11] This finding was never mentioned by the Court of Appeals, although it purported to base its decision on the facts found by the District Court. (Appendix B, p. 34a, *infra*)

from demonstrating the absence of sufficient economic power as a matter of fact.[12]

Since the case was never tried or decided by the trial judge on a tie-in theory, Sinclair in its Petition for Rehearing to the Court of Appeals sought an opportunity to prove on remand that it lacked the economic power to impose a tie-in on its dealers; that it encountered intense competition from more powerful oil companies for dealers and service station sites; and that dealers in fact were not subservient but exhibited a high degree of independence. (Certified Transcript of Record, Vol. II, p. 30)[13] In rejecting the Petition, the Court below held that such proof was legally immaterial because Sinclair had "sufficient size to assert *some* power." (Appendix B, pp. 47a-48a, *infra*), (emphasis added) And this, in the Court's view, was dispositive.

The holding of the Court of Appeals represents a serious misapplication of the law as expounded by this Court in *Times-Picayune* and *Northern Pacific*. For one thing, it ignores what this Court said in *Northern Pacific*:

> "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attrib-

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[12] The error of the Court of Appeals is compounded by the fact that it even used the wrong statistic. While Sinclair accounted for approximately 10% of gasoline sales in Maryland, only 50-60% of such sales were made to dealers who handled TBA. (R. 28-29) Therefore, total Sinclair gasoline sales do not constitute a reliable measure of any power which its gasoline might have conferred over TBA.

[13] Upon termination of Osborn's relationship with Sinclair, other oil companies began to vie for Osborn's custom. After rejecting offers from Standard, Texaco, Cities Service and Crown, Osborn resumed business in a Shell station, attracting to his new establishment a considerable number of his former customers. (Tr. 199-201)

utable to such tying arrangements would obviously be insignificant at most." [14]

Size alone, unrelated to countervailing competitive forces, provides no reasonable foundation for an inference, much less a conclusive presumption, that the seller is in a position to pressure his customers into taking a product which they would rather purchase elsewhere.

The upshot of the ruling below is that sufficient economic power is not a real subject of inquiry in a tie-in case under the Sherman Act, but is automatically inferred from the mere existence of an alleged tie-in. This devitalization of the rule of *Northern Pacific* is wholly unwarranted. It is particularly unwarranted where, as here, there was no express tie-in, no requirement that buyers refrain from handling competing products or take any determinate quantity of the supposedly tied product,[15] and not even a shred of proof as to what portion of the purchases were prompted by the so-called "tie-ins" rather than by genuine customer desire to reap benefits which the District Court found were uniquely available from dealing in Goodyear TBA.[16]

2. In order for a tie-in to be declared illegal *per se* under the Sherman Act, it must be shown that it has foreclosed a substantial segment of commerce in the tied article. This test was never satisfied here because there was no proof or finding indicating the volume of Goodyear TBA which the Sinclair dealers purchased as the proximate result of supposedly unlawful sales pressure. In addition to this fatal deficiency, there was neither proof nor finding indi-

[14] 356 U. S. at 6-7.

[15] Although non-exclusivity is plainly relevant in negating the existence of sufficient economic power, the Court of Appeals completely disregarded this fact when it assumed that the necessary power existed.

[16] See note 18, *infra*.

cating a total TBA market against which to measure the substantiality of any foreclosure.

(a) The only scrap of evidence in the record which could conceivably bear on the degree to which commerce in TBA was "foreclosed" consists of a list of dollar sales of Goodyear TBA to Sinclair dealers in Maryland, which averaged slightly under $800,000 annually from 1948 to 1959. (R. 29) But the Court of Appeals did not refer to these statistics as establishing substantial foreclosure. Nor could it properly have done so in view of the fact that there was not even a hint of how much of this volume was produced by the claimed sales pressure, as distinguished from the free choice of dealers in buying the Goodyear brand in preference to other TBA.[17] The total Goodyear TBA purchases of 321 Sinclair dealers cannot automatically be aggregated without a consideration of whether the dealers made their purchases by reason of Sinclair's claimed leverage or because they wanted to handle the Goodyear line.[18]

[17] As we have pointed out, the District Court made no finding as to the existence of a tie-in between Sinclair and any of its dealers, and the Court of Appeals never referred to any evidence of separate tying arrangements with any of Sinclair's 321 Maryland dealers except Osborn. See pp. 5-6 and note 7, *supra*. Osborn was the only dealer with whom Sinclair refused to deal because of TBA considerations. And Osborn's annual purchases of Goodyear TBA from 1952 to 1956 averaged less than $4,000. (R. 73)

[18] The District Judge expressly found that

> ". . . some of the benefits derived by [a Sinclair dealer] from handling Goodyear TBA would not be derived by him from handling other TBA even though nationally advertised and of substantially equal quality with Goodyear." (R. 42)

In the teeth of this finding—which it did not even mention, much less hold clearly erroneous—the Court of Appeals wrote that

> "there is no suggestion that . . . there was any benefit to the dealers in handling Goodyear rather than one of the other lines." (Appendix B, p. 35a, *infra*)

Needless to say, a seller may lawfully promote the sale of more than one product to his customers. Indeed, the seller may even offer "two items as a unit at a single price" where "the buyer is free to take either product by itself." *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 6 n. 4 (1958). See also *Ford Motor Co.* v. *United States*, 335 U. S. 303, 316-19 & n. 3 (1948).

Proximate cause is an especially critical element in this case because, unlike other tie-in cases before this Court, there admittedly was no undertaking here to eschew competing goods or to buy any determinate quantities of the allegedly tied product.

The entire discussion of the Court of Appeals on the issue of substantiality is as follows:

> "The finding [of the District Court] was that a not insubstantial amount of commerce is affected." (Appendix B, p. 42a, *infra*)

No facts are stated in its opinion to support this conclusion. Nor does the record contain any such facts. Moreover, the District Court did not make the finding ascribed to it. It simply observed, by way of dictum in its opinion, that Sinclair dealers in Maryland handled enough TBA to constitute a not insubstantial amount of commerce. (Appendix B, p. 16a, *infra*) The Court's general observation related to TBA of all brands. No finding was made with respect to Goodyear TBA alone. The short of the matter is that there is nothing in the record to support a determination that a substantial amount of Goodyear TBA was sold to Sinclair dealers as the proximate result of the supposed restraint—even if, contrary to our submission, substantiality can be measured by dollars alone divorced from a market framework.

(b) Even if $800,000 worth of annual TBA business had been pre-empted in Maryland by a tie-in, the Court of Appeals' decision incorporates an error of law on a point which has not been, but should be, clearly settled by this Court. There is no evidence as to the total annual dollar volume of TBA sold in Maryland or anywhere else. Nor is there any evidence as to how the market, in terms of which substantiality of foreclosure is to be assessed, should be

delineated—except that it is reasonably apparent that the area of effective competition is not confined to Maryland. It is thus evident that the Court of Appeals has held that substantiality of foreclosure signifies an absolute quantitative test and does not require any comparative reference. Such an approach conflicts with this Court's recent decision in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961), where a requirements contract was upheld under Section 3 of the Clayton Act even though it foreclosed $128,000,000 worth of business over a 20-year term. For when viewed in its market setting, this undeniably "considerable sum of money"[19] represented an insignificant .77%. The essence of the Court's reasoning was this:

> "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. *It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.*"[20]

While it is true that *Tampa Electric* involved the application of Section 3's standard of legality to a requirements contract, not a tying arrangement, the fact remains that the same statutory language applies to both species of restraint. Since the focal point of the inquiry in each case is the competitive significance of foreclosure, the substantiality of that foreclosure should be evaluated by a comparative yardstick in both—and surely under Section 1

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[19] 365 U. S. at 334.

[20] *Id.* at 329 (emphasis added).

of the Sherman Act as well as under Section 3 of the Clayton Act. To the extent that *International Salt Co. v. United States*, 332 U. S. 392 (1947) and *Northern Pacific* indicate that substantiality can be predicated on dollar volume alone, they are hostile to this Court's more recent pronouncement in *Tampa Electric*.

Once it is determined that the proper test is one of comparative, not absolute, substantiality, it follows that the judgment below must be reversed because the record does not disclose total TBA sales for any area—Maryland or otherwise. Under the teaching of *Tampa Electric*, it should be noted, the area of effective competition is broader than Maryland, since it is plain that Goodyear and competing TBA suppliers, which ship into Maryland, compete outside as well. (R. 28)

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The Court of Appeals has misunderstood us as advancing contentions that "would convert tie-in cases to 'rule of reason' cases with the requirement of public injury." (Appendix B, p. 48a, *infra*) We wish to be positive that this Court does not so misconstrue our position. We accept without question that in a true tie-in case, when it is shown that economic coercion has been exerted by reason of leverage in one market to foreclose a substantial portion of commerce in another, there is no necessity to inquire into the actual effect of the practice on competition. But we maintain that a factual inquiry is necessary to establish the existence of sufficient economic power and the substantiality of foreclosure—the conditions precedent to invoking the *per se* doctrine of *Northern Pacific* in the first place.

3. The supposed tie-ins involved in this case have never even approximated exclusive dealing arrangements. As the District Court found:

> "Sherwood dealers purchase various types, brands and quantities of competitive TBA products from other suppliers." (R. 43)

The Court further found:

> "Nearly all of the Sherwood-Sinclair stations handled some Goodyear TBA but no Sherwood-Sinclair service station handled Goodyear TBA exclusively." (R. 30)

The Court of Appeals accepted these findings. But it considered them immaterial under its view of the law (concededly a novel one) that the *per se* rules of *Northern Pacific* apply where sale of one article is allegedly conditioned on purchase of indeterminate "substantial" quantities of another.

In breaking this new ground, the Court below wholly ignored this Court's decision in *Federal Trade Commission* v. *Sinclair Ref. Co.*, 261 U. S. 463 (1923). There, dealers who leased pumps from Sinclair were prevented from using them to dispense gasoline supplied by Sinclair's competitors, but were free to purchase gasoline from any source for use in other pumps. The fact that the dealers were not restrained from patronizing other sellers was held to negate the existence of a tying arrangement which violated the Clayton Act.

To be sure, in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), where the Court struck down a series of contracts tying the sale of a nonpatented product to the lease of patented machines, there was no affirmative showing that the patent monopoly was broad enough to prevent the manufacture and sale of competing machines. However, since *International Salt* did not cite, much less overrule, the *Sinclair* case, the Court must have assumed that users of International's machines could not, as a practical

matter, be expected to invest in additional equipment—even if it were available—in order to secure the freedom to buy competing salt.[21] The present case affords no parallel. For here Sinclair dealers did not have to take on another brand of gasoline in order to purchase non-Goodyear TBA. And, in point of fact, they purchased a variety of TBA brands. (R. 43)

Only recently, in *Tampa Electric*, this Court pointedly left open the question of whether a requirement of exclusive dealing is an indispensable element of a violation of Section 3 of the Clayton Act.[22] That question, transposed to a Sherman Act context, is ripe for decision now. We do not mean to suggest that a restraint of trade must always entail an exclusive dealing obligation to be cognizable under the Sherman Act. We do say, however, that absent the element of exclusivity, the arrangement must as a minimum be tested under the rule of reason and not under the *per se* doctrine of *Northern Pacific*.

4. The public import of the Court of Appeals' decision is best appreciated when its holdings are considered in combination rather than separately.[23] Under this decision, no trader of any size can safely do business with customers who habitually purchase more than one item from him. If his share of the market for one product is of the order of 10%, he will be presumed to possess leverage. A court may infer that he is effectively exercising that leverage even though his customers are not under any exclusive

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[21] *Cf. Standard Oil Co.* v. *United States*, 337 U. S. 293, 303-04 & n.6 (1949), where the *Sinclair* case was cited with approval.

[22] 365 U. S. at 329-30 & n.7.

[23] Its decision has already been cited with approval by the Federal Trade Commission in *The Firestone Tire & Rubber Co.*, FTC Dkt. 6487, Trade Reg. Rep. Par. 29,427 (1961), and *The Goodyear Tire & Rubber Co.*, FTC Dkt. 6486, Trade Reg. Rep. Par 29,426 (1961).

dealing obligation, but freely purchase varying, indeterminate amounts of the allegedly "tied" product from him —amounts which are sufficiently less than their requirements to leave ample room for competing suppliers. What is more, these conjunctive sales can subject him to Sherman Act liability although his volume in the tied product represents but a miniscule fraction of the total market available to his competitors; and this without regard to whether or not any competitive harm has in fact been inflicted. In not taking into account the fact that many of the dealers may have purchased Goodyear TBA as a matter of personal and trade preference, and in applying mechanical *per se* rules to the novel situation presented by this record, the Court of Appeals imposes risks on multi-product sellers which this Court could never have contemplated when it outlawed far-flung networks of express tie-ins in its prior decisions.[24]

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[24] While the judgment below is not, technically, a "final" one, this presents no obstacle to the granting of the writ under 28 U. S. C. Section 1254(1), since the judgment finally determines issues "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U. S. 373, 377 (1945). See also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U. S. 731, 734 n.2 (1947). The judgment forecloses any further consideration in this case of the existence of an antitrust violation. The issues presented for review in this Petition are as fully documented, and as ripe for consideration by this Court, as they will ever be. On the other hand, remand for trial on the entirely separable issue of damages is but the prelude to further protracted and complicated litigation, which subsequent reversal on the issue of violation would render moot and wasteful.

## Conclusion.

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

May, 1961

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## APPENDIX A.

### Sherman Act, 26 Stat. 209 (1890), as amended.

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. [Provisos omitted] . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

### Clayton Act, 38 Stat. 730 (1914).

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal

in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## APPENDIX B.

### Opinion of the United States District Court for the District of Maryland.

THOMSEN, Chief Judge

This is a private antitrust suit under 15 U.S.C.A. 15. Plaintiff claims that his service station lease and dealer's sales agreement were cancelled by defendant (Sinclair) in furtherance of an attempt by Sinclair to monopolize the sale of tires, batteries and accessories (TBA) to its service station dealers in Maryland and/or a combination or conspiracy between Sinclair and Goodyear Tire and Rubber Company (Goodyear) to restrain trade in those products.

FACTS

Sinclair is a refiner and distributor of petroleum products in interstate commerce.

Sherwood Bros., Inc. (Sherwood), which had originally been an independent distributor of petroleum products in Maryland, became a wholly owned subsidiary of Sinclair in 1935. Thereafter it sold Sinclair petroleum products in most of Maryland and in small areas of adjacent states until the end of 1955, when Sherwood was merged into Sinclair. Since January 1, 1956, Sinclair has conducted, through its Sherwood Division, the business which had previously been conducted by Sherwood. The term Sherwood will be used herein to include both Sherwood Bros., Inc., and the Sherwood Division of Sinclair unless the context otherwise requires.

Before it became a subsidiary of Sinclair, Sherwood had operated service stations with its own employees. About 1936, as a result of the enactment of the Wage and Hour and Social Security laws by Congress and of laws imposing "chain store taxes" in many states, Sinclair and Sherwood changed to a policy of leasing service stations to dealers. Thereafter Sinclair and Sherwood sought to avoid such

control over their service station operations as would make them liable under those statutes.

Plaintiff was employed by Sherwood in 1932 as an attendant, and later as manager of its service station in Reisterstown, Baltimore County, Maryland, at the point where the Westminster and Hanover Roads join to form Reisterstown Road. In 1936 plaintiff leased the station from Sherwood; that lease was cancelled in 1948, and a new lease was executed, which continued on a year to year basis until May 31, 1956, when it was cancelled by Sherwood.

Goodyear is a manufacturer of tires and other products and a distributor of a full TBA line, which includes, besides tires and batteries, all sorts of car and home merchandise, from spark plugs to spot lights and from children's toys to motor boats and room coolers. Practically all Goodyear TBA sold in Maryland is manufactured outside the state.

Total sales of gasoline in Maryland were 638,000,000 gallons in 1952, 817,000,000 gallons in 1956. During the same period Sherwood's tax paid sales in Maryland increased from 77,000,000 to 87,000,000. Fourteen competitive brands of gasoline were sold in Maryland, sixteen of tires and tubes, fourteen of batteries, and numerous brands of oil filters, fan belts, spark plugs, and other TBA items.

In 1954-56 there were over 2300 service station dealers in Maryland, including 1,000 in the metropolitan Baltimore marketing area, who were primarily engaged in selling gasoline, but also sold TBA. There were about 200 other TBA dealers in the state, half of them in the Baltimore area. There were some 300 service station dealers in Maryland selling Sinclair products, including some 200 in the metropolitan Baltimore district. About 300 other outlets—stores, garages, etc.—sold Sinclair petroleum products.

In 1956 there were 28 establishments selling gasoline in Reisterstown and the surrounding area, of which 22 sold various brands of TBA; there was one automotive supply store. On the Reisterstown Road, in Reisterstown proper,

there were two Sinclair stations, two Esso stations, one Sunoco station, and a third large Sinclair outlet.

Goodyear sold TBA to a large number of contract dealers, such as tire stores and service stations, which had a sufficient volume of business to qualify for the various discounts allowed to dealers. All such dealers were billed by Goodyear at the list price less the applicable discount based on the volume of the dealer's purchases, except that in some cases a greater discount was allowed to meet competition. In addition, Goodyear paid bonuses (really additional discounts) based on total annual purchases. The contract dealers sold retail to consumers and wholesale to smaller service station dealers, tire dealers, truck operators and commercial consumers. Goodyear itself operated stores, which sold wholesale and retail.

While Sherwood operated service stations with its own employees it sold Firestone TBA through those stations. After the stations were leased to dealers Sherwood had an oral arrangement with Firestone under which it received a commission from Firestone in connection with promotion and sale of Firestone products through its lessee-dealers. Sinclair had similar oral arrangements with Goodyear. Some time after Sherwood had become a subsidiary of Sinclair, Sherwood terminated its arrangement with Firestone and made a similar oral arrangement with Goodyear.

In 1944 the Sherwood-Goodyear agreement was reduced to writing in the form of a letter from Goodyear to Sherwood, which read in part as follows:

> "We now confirm discussions with you relative to services to be rendered by you during the balance of the year 1944, and thereafter from month to month unless cancelled by either party on thirty (30) days' written notice to the other, in promoting the sale of Goodyear tires (casings and tubes), batteries and merchandise listed in Sections I, II and III of our Car and Home Supply Catalog as supplemented

from time to time (referred to herein as car and home merchandise), through such independent resale outlets as are otherwise engaged in or propose to engage in the sale of your products and as are agreed upon in writing with you from time to time.

"During the period mentioned it is understood that you will actively assist us in selling and in promoting the sale of the above merchandise to such customers, and at our request from time to time you will have your field representatives call upon these customers in company with our salesmen and otherwise, and will cooperate and assist us in our efforts to promote and encourage the sale of such merchandise by the customers to whom such sales shall be made by us. The right to accept or reject any order received from any customer shall at all times rest with us.

"You will see that your field offices work energetically with us with the view to assisting us to the fullest practicable extent in perfecting arrangements with all such customers. You will at all times maintain adequate, qualified personnel to render the services called for hereunder regularly and efficiently."

The agreement provided that Goodyear should pay Sherwood a 10% commission on tires and batteries sold to Sherwood dealer outlets, a 7½% commission on such products sold to Sherwood distributors, and commissions of 5% to 10% on car and home merchandise. Sherwood was prohibited from paying any part of these commissions to its customers.

Also in 1944 the first written agreements were entered into between Sinclair and Goodyear. A "tire and battery letter" provided for the sale by Goodyear to Sinclair of tires, tubes and batteries for resale to Sinclair for fran-

chise holders[1] who maintained an inventory of Goodyear merchandise. Sinclair never had physical possession or risk of loss of such merchandise or more than instantaneous title thereto. Orders were sent directly to Goodyear by the franchise holders and the merchandise was shipped by Goodyear to them. Service station dealers gave orders for Goodyear merchandise to Sinclair salesmen and to Goodyear salesmen, as well as to salesmen for the franchise holders. These salesmen transmitted all orders to the franchise holders. Under this purchase-and-resale plan Sinclair promoted the sale of Goodyear merchandise in much the same way as Sherwood did under the sales-commission plan. In addition, Sinclair and its franchise holders handled all adjustments for defective merchandise, and Sinclair handled billing, crediting and collecting, and bore the credit risk.

It is obvious that the arrangement embodied in the tire and battery letter could not be successful, and Sinclair would not get any benefit therefrom, if Goodyear sold many tires, tubes and batteries directly to Sinclair service stations. There was always, however, active competition between Sinclair's franchise holders and other Goodyear distributors.

A "car and home letter" similar to the 1944 Sherwood-Goodyear letter agreement, provided for the payment of commissions by Goodyear to Sinclair on sales of car and home merchandise by Goodyear to resellers of Sinclair petroleum products. The car and home merchandise which was marketed by Goodyear was generally sold under the trade name of some other well known manufacturer, and was almost always available from other sources.

There was no contractual or other legal obligation on any Sherwood or Sinclair lessee dealer to purchase Good-

[1] The letter also covered the resale of such merchandise by Sinclair through its company-operated outlets, but none of these are involved in this case.

year TBA or to refrain from purchasing other TBA products. The dealers could obtain the benefits of volume purchases from other tire manufacturers and TBA marketers. In practice the Sherwood dealers purchased various types, brands and quantities of competitive TBA products from other suppliers. Sinclair and Goodyear agreed:

> "• • • that under its policy Sinclair does not undertake to, and will not in fact, exercise or attempt to exercise any control or authority, directly, indirectly, by coercion or otherwise, over a dealer or any phase of the conduct of his business, regardless of whether or not Sinclair may own in fee or hold under lease the site or other station facilities occupied and operated by the dealer as an independent contractor and merchant in his own right; and that Sinclair specifically requests that Goodyear not ask or expect that such control or authority be exercised; and that Goodyear will not permit its salesmen or other field or office representatives to undertake to exercise such control or authority in connection with any phase of the agreement."

This policy was incorporated in Sinclair's operating manuals, used by Sherwood.

Neither Sherwood nor Sinclair sold or promoted the sale of Goodyear TBA products to persons other than Sherwood or Sinclair dealers. The various agreements with Goodyear contemplated only the promotion of TBA sales to existing or prospective retail distributors of Sinclair petroleum products and the purchase by Sinclair[2] of tires and batteries for resale to such retail distributors. The principal purpose of Sherwood and Sinclair in effecting these agreements was to supply a full line of TBA products to the service stations handling Sinclair petroleum products. The parties are agreed that it is desirable for a dealer

[2] And by Sherwood after January 1, 1956.

to be able to furnish one-stop service to the motoring public and that the availability of a complete line of TBA at a service station attracts customers for gasoline, oil and the other services the dealer offers. Under the agreement which Sherwood and Sinclair had with Goodyear, there was available to their dealers a convenient source of supply of TBA products nationally advertised under well-known brand names. The dealer could expect prompt deliveries and therefore did not need to carry excessive inventories. He could sell Goodyear tires, tubes, batteries and some other Goodyear TBA products on Sinclair credit cards without extending credit himself. The Sherwood-Sinclair service station dealers derived certain benefits from the agreements between Sherwood-Sinclair and Goodyear, although they could have obtained most of the benefits from handling other nationally advertised brands of TBA.

The 1944 Sherwood-Goodyear agreement was in effect when Sherwood became a division of Sinclair on January 1, 1956. Thereupon, the Sinclair-Goodyear "tire and battery" and "car and home" letter agreements became applicable to the Sherwood Division. The change made very little difference in net earnings to Sherwood, and had no effect upon the prices which Sherwood dealers paid for Goodyear TBA.

Before January 1, 1956, Goodyear had solicited direct purchases of tires, tubes and batteries by Sherwood service station dealers, and had paid Sherwood a commission on all such sales. After January 1, 1956, Brooks-Huff Tire Company, which had been a Goodyear tire and battery dealer in Baltimore, gave up its Goodyear franchise and became a Sinclair franchise holder. Thereafter Goodyear did not solicit direct purchases of tires, tubes and batteries by Sherwood dealers in the metropolitan Baltimore area. Such sales were made either by Brooks-Huff or by another Sinclair franchise holder, except in those isolated instances where a service station dealer preferred to buy direct from Goodyear. After January 1, 1956, Sherwood received a

profit on all sales made by it to Brooks-Huff, but received no profit or commissions on any sales of tires, tubes and batteries made by Goodyear direct. Before 1956 plaintiff had purchased Goodyear TBA direct from Goodyear. Shortly after January 1, 1956, a Sherwood sales representative told plaintiff that he was no longer a Goodyear distributor and that he should purchase Goodyear tires, tubes and batteries from Brooks-Huff. About the same time a Goodyear salesman said that he would no longer accept orders from plaintiff for such merchandise. However, plaintiff could purchase Goodyear tires, tubes and batteries from Brooks-Huff on the same terms and discounts that he had purchased them directly from Goodyear prior to January 1, 1956, and plaintiff could and did purchase Goodyear car and home products directly from Goodyear both before and after January 1, 1956.

Other Goodyear distributors in Baltimore and elsewhere continued to compete for the TBA business of the Sherwood dealers, and plaintiff also continued to purchase all kinds of TBA products from wholesale houses in Baltimore, Reisterstown, Westminster, or wherever he chose.

Sherwood regarded Goodyear TBA in its entirety as one of the Sherwood lines, and was not pleased when its dealers carried a large stock of other TBA products. Sherwood and Sinclair believed that both they and their dealers would benefit if the dealers handled an appropriate quantity of TBA and they naturally preferred that the dealers carry the Goodyear line.

The purchase of Goodyear TBA was discussed by Sherwood with prospective lessees. They were told that there was a general identity between the names of Sinclair and Goodyear across the country and that Sherwood liked to see those names held together so far as its service to the motoring public was concerned. The normal procedure was to sign the lease and dealer sales agreement and to secure the initial TBA order simultaneously. Sherwood impressed on its sales personnel the desirability of dealers

carrying 100% Goodyear TBA products. They, in turn, used their best efforts to persuade the dealers to purchase Goodyear TBA in preference to other lines.

It was not the practice of Sherwood or Sinclair to prohibit their dealers from displaying on the leased premises signs advertising TBA products other than Goodyear TBA. They frequently requested dealers to remove such signs but they did not force the dealers to remove them and many Sherwood stations displayed signs advertising other brands of TBA.

Sherwood established annually TBA quotas for each of the territories covered by its sales representatives, but did not ordinarily assign quotas to each individual service station dealer. The sales representatives usually discussed with their dealers the level of Goodyear TBA sales which they thought such dealers should reach. Sherwood distributed through its sales representatives blank forms to be used by a dealer in calculating his potential and actual TBA business, but did not require that all dealers use them. Field employees prepared reports showing what brands of TBA were displayed for sale by the several dealers. Nearly all of them handled some Goodyear TBA but no dealer handled Goodyear TBA exclusively.

Sherwood held a sales meeting each spring, at which the dealers were exhorted to greater efforts by John R. Sherwood, president of the company. The principal emphasis was on gasoline gallonage, but he made it clear year after year that he was dissatisfied with the TBA sales. There is a conflict in the testimony as to what was said at a particular meeting in or about 1949. It is difficult for anyone to remember exactly what was said on such an occasion ten years ago, but I find that the dealers understood and Sherwood intended them to understand that unless they purchased more Goodyear TBA some of the leases would be terminated.[3] Around 1950 Sherwood set a goal

[3] The testimony dealing with the conversations among the dealers immediately following Mr. Sherwood's speech is admissible to show

of a million dollars of TBA sales, which was not reached until 1958. Sinclair had calculated that $35 of TBA sales per 1,000 gallons of gasoline sales was a reasonable quota, and the Sherwood service station dealers as a whole were buying only about one-half of that amount. Of course, some dealers were buying at much higher levels than others. The tire companies had figured the service station potential at $135 of TBA retail sales per 1,000 gallons of gasoline; that would have meant $90 wholesale per 1,000 gallons, so the Sherwood quota of $35 per 1,000 gallons does not appear unreasonable.

Sherwood kept records of the purchases of Goodyear TBA by its dealers and considered this item along with others in determining whether to renew or terminate a dealer's lease at the end of each year. The final decision was made on the basis of the dealer's overall performance. The most important factor considered was the total gallonage of gasoline sold by the dealer. Besides TBA, other factors considered included cleanliness of the station, hours of operation, quality of service offered the public, personal interest and attentiveness of the dealer to the operation of the station, and the increase or decrease in the volume of sales from year to year.

In addition to being the lessee of a Sherwood service station in Reisterstown, plaintiff operated a Firestone TBA business in connection therewith and was the sole stockholder of a corporation which operated a Firestone store in Westminster.[4] During the period that plaintiff was a Sherwood dealer, he sold much larger quantities of Firestone than Goodyear TBA. He told Sherwood that Fire-

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their understanding of what he had said, and by inference therefrom what he had intended them to understand. So is plaintiff's testimony as to what he had understood Mr. Sherwood's statements to mean. *Linden* v. *United States*, 4 Cir., 254 F. 2d 560; *Hard* v. *United States*, 9 Cir., 157 F. 2d 630; Wigmore on Evidence, §1790.

[4] Plaintiff was also the owner of a 437-acre farm in Carroll County.

stone would remain his major line, but that he would also carry Goodyear and let the public choose between them.

His first lease was cancelled by Sherwood in 1948 because of the decline in the gasoline gallonage and because plaintiff was not handling enough Goodyear TBA products. Following a conference, at which plaintiff had agreed to place an order for over $1,000 worth of Goodyear TBA, Sherwood's sales manager decided to give him another chance, and signed a new lease. Plaintiff thereafter bought some Goodyear TBA, but he continued to buy more than ten times as much Firestone TBA.

Although Sherwood's sales representatives told plaintiff over the years that he ought to buy more Goodyear TBA products, they neither stated explicitly nor implied clearly that he had to do so in order to keep his lease.

The second lease provided for a rental equal to 1½¢ per gallon of gasoline and motor fuels delivered to the station, with a minimum of $400 per month. However, in accordance with its general custom, Sherwood waived the minimum rent and accepted lower amounts per gallon over a period of several years before and during the rebuilding and enlargement of the station in 1953-54. The lease and the dealer sales agreement which supplemented it contained provisions for termination by either party at the end of the original term or any successive yearly term, on thirty days' notice.

The service station leased to plaintiff occupied the best location in the Reisterstown area. This was an important factor in inducing Sherwood to rebuild and enlarge the station in 1953. In 1954, after the station had been rebuilt, a Sherwood representative (DeHuff) asked plaintiff what he intended to do about Goodyear TBA. Plaintiff replied that he intended to carry and display Goodyear along with Firestone, but that he could not economically get rid of his Firestone franchise. DeHuff said that one way Sherwood expected to recover the expense of the rebuilding was by plaintiff handling more Goodyear TBA.

*Appendix B.*

The fact that plaintiff carried so much more Firestone TBA than Goodyear TBA was one of the factors, along with others affecting the complete operation of the station, considered by the sales representative each year in making up his mind whether to recommend to his superiors that plaintiff's lease be renewed or terminated, and by the sales manager in making the final decision.

When the responsible individuals at Sherwood considered whether to renew or terminate plaintiff's lease in the spring of 1956, they thought that his gallonage had not increased in 1955 to the extent that it should have increased, considering the recent expenditure of $31,000 for the enlarged station.

I find that those two factors — gasoline gallonage and TBA problems — substantially contributed to Sherwood's decision to cancel the lease in 1956. I do not find that either of the two factors was predominant.[5]

Plaintiff suffered damage as a result of the cancellation, but it was agreed at a pretrial conference that no proof of the amount of such damage should be offered until after it has been determined whether there was any violation of the antitrust laws. Plaintiff did not prove that he suffered any other damage as a result of the alleged violations.

Discussion

It is a settled principle of law that in the absence of a purpose to create or maintain a monopoly a manufacturer or a distributor has the right freely to exercise his independent discretion as to the parties with whom he will deal. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307;

[5] This, however, would not be fatal to plaintiff's claim for damages sustained as a result of the cancellation if he had shown a combination in restraint of trade or an attempt to monopolize in violation of the Sherman Act, and that such illegal motive substantially contributed to the decision to cancel. *Momand* v. *Universal Film Exchanges, Inc.*, 1 Cir., 172 F. 2d 37. See also *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

*Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 625; *Schwing Motor Co.* v. *Hudson Sales Corp.*, D. Md., 138 F. Supp. 899, 902, aff'd 4 Cir., 239 F. 2d 176, cert. den. 355 U. S. 823; *Miller Motors Inc.* v. *Ford Motor Co.*, 4 Cir., 252 F. 2d 441, 451; *Nelligan* v. *Ford Motor Co.*, 4 Cir., ..... F. 2d .....; *Hudson Sales Corp.* v. *Waldrip*, 5 Cir., 211 F. 2d 268, 274, cert. den. 348 U. S. 821; *Nelson Radio and Supply Co.* v. *Motorola*, 5 Cir., 200 F. 2d 911, 915, cert. den. 345 U. S. 925. Sinclair has the right, acting independently, to refuse to renew a service station lease for the reason that the dealer has failed to sell Goodyear TBA, or to sell it in sufficient quantities, or to sell it exclusively. Furthermore, Sinclair can announce such requirements in advance of entering into a lease or in advance of a renewal date.

On the other hand, a manufacturer or distributor loses his right to refuse to deal if such refusal is in furtherance of a conspiracy in restraint of trade under sec. 1 or of an attempt to monopolize under sec. 2 of the Sherman Act. But the mere fact that Goodyear and Sinclair have entered into marketing agreements does not per se restrict Sinclair's right to terminate its leases for any reasons it sees fit.

Since the marketing agreements do not contain any provisions which in and of themselves violate the antitrust laws, we must consider whether they were used to violate those laws.

Plaintiff concedes that he has not proved a tying arrangement which violates sec. 3 of the Clayton Act, 15 U.S.C.A. 14. Neither the lease nor the dealer agreement was made upon any condition, agreement or understanding that plaintiff refrain from buying or selling TBA products other than Goodyear's. Plaintiff must show that Sinclair's conduct violated the Sherman Act by imposing or attempting to impose an unreasonable restraint on interstate commerce. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1; *Radovich* v. *National Football League*, 352 U.S. 445; *Times-Picayune Publishing Co.* v. *United States*, *supra*; *Chicago Board of Trade* v. *United States*, 246 U.S. 231; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 9 Cir., 255 F. 2d 214.

Plaintiff does not contend that every restraint on interstate commerce involves a violation of the antitrust laws.

even though the restraint may involve a substantial amount of commerce; he does contend that if he proves an unreasonable restraint of a not insubstantial amount of interstate commerce, such unreasonable restraint is presumed to be a public injury.

Plaintiff contends that the relevant market is the market for TBA products among Sinclair lessee dealers in the Sherwood division. If there were such a restraint of trade or attempt to monopolize as existed in *International Salt Co.* v. *United States*, 332 U.S. 392; *Standard Oil Company of California* v. *United States*, 337 U.S. 293, and *Northern Pacific Railway Co.* v. *United States*, *supra*, the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce. In those three cases, however, there was a clear restraint of trade or attempt to monopolize, apparent from the provisions of the written contracts themselves. No such per se violation is apparent in the present case, for neither the letter-contracts between Sherwood-Sinclair and Goodyear nor the agreements between Sherwood and its dealers contain any similar provisions. Any possible intent to monopolize or to unreasonably restrain trade in this case must be gleaned from the way in which the agreements were used. In deciding whether an illegal intent existed, the general market for TBA products in the metropolitan Baltimore area and elsewhere in Maryland must be considered; the same market must also be considered in deciding whether there was any actual monopoly or restraint of trade. *United States* v. *duPont & Co.*, 351 U.S. 377; *Times-Picayune Publishing Co.* v. *United States*, *supra*; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, *supra*.

Plaintiff relies strongly on the GMAC case, *United States* v. *General Motors Corporation*, 7 Cir., 121 F. 2d 376, cert. den. 314 U.S. 618, reh. den. 314 U.S. 710, to support his contention that Sinclair was using its natural monopoly of its own brand-name petroleum products to invade the TBA field. The instant case, however, is very different from the General Motors case: (1) General Motors required dealers

to promise to use GMAC financing exclusively. Sinclair did not require its dealers to use Goodyear TBA exclusively or to promise to use it exclusively. (2) The scheme to require GMAC financing bore no relation to the good will of General Motors or to its line of care. It is conceded that Sinclair had a valid interest in seeing that its dealers carried a full line of high quality TBA, and I have found as a fact that the dealers, as well as Sinclair, derived certain benefits from the TBA arrangements with Goodyear. The predominant motive which Sherwood and Sinclair had for entering into the agreements with Goodyear was a legitimate business motive. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. at 622; *Chicago Board of Trade* v. *United States*, 246 U.S. at 238. (3) General Motors dominated the automotive field. Sinclair has no such dominant position in the petroleum field in Maryland or elsewhere.[6] (4) Sinclair was not using its economic position as a refiner and distributor of petroleum products to invade and dominate the TBA business. *Times-Picayune Publishing Co.* v. *United States*, *supra*; *Miller Motors* v. *Ford Motor Co.*, *supra*; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, *supra*. The evidence does not support plaintiff's contention that Sherwood or Sinclair had either the intent or the purpose to monopolize the TBA market. There are many brands of TBA merchandise available to service station dealers and to consumers. Plaintiff and the other Sherwood-Sinclair dealers whom he called as witnesses showed that in practice Sinclair dealers carry other brands of TBA as well as Goodyear.

Nor is there any evidence of a conspiracy between Sherwood-Sinclair and Goodyear to restrain trade in the TBA market. It has been noted that every contract is to some extent a restraint of trade, but not every contract amounts to a conspiracy in violation of the Sherman Act. *Chicago*

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[6] Although this fact might not be important if there were clear restraints in the agreements themselves, as there were in *International Salt*, *Standard Stations* and *Northern Pacific*, it should be considered in determining whether there was any unreasonable restraint of trade.

*Board of Trade* v. *United States*, 246 U. S. at 238. "It is not sufficient for the plaintiff to prove a cooperative effort between [Sinclair and Goodyear], but it must be shown that the combination had the objectionable features which the Act is designed to prevent." *Miller Motors, Inc.* v. *Ford Motor Co.*, 242 F. 2d at 446.

The TBA agreements between Sinclair-Sherwood and Goodyear have not resulted in any increase in the wholesale prices charged to dealers or retail prices charged to the public. Goodyear TBA products compete with those of Firestone, Goodrich and other manufacturers and distributors on the basis of price, quality and other relevant factors.

Since there was no per se violation of the antitrust laws, plaintiff had to prove facts which show public injury from the alleged attempt to monopolize. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. at 614; *Radovich* v. *National Football League*, 352 U. S. at 453; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 4 Cir., 72 F. 2d 885; *Schwing Motor Co.* v. *Hudson Sales Co., supra; Miller Motors, Inc.* v. *Ford Motor Co., supra; Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra.* The keen competition between suppliers for the service station business prevents control of wholesale prices by the Sinclair-Goodyear arrangement. There is no evidence in this case of any horizontal price fixing agreements between any of the tire companies or any of the oil companies with respect to TBA. Nor is there any suggestion of "price leadership" in the TBA business in Maryland. The public has a choice of brands at Sinclair stations, and is free to buy any of the competing brands at service stations operated by other companies and at all sorts of other retail outlets. The Goodyear TBA products compete with those of other manufacturers and distributors on the basis of price, quality and all other relevant factors. Plaintiff has failed to prove any injury to the public from the Sinclair-Goodyear marketing arrangement.

No violation of the antitrust laws has been shown. Let judgment be entered in favor of the defendant, with costs.

*Appendix B.*

**Opinion.**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 7899.

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S. KRIETE OSBORN,

Appellant,

*versus*

SINCLAIR REFINING COMPANY,

Appellee.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.*

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(Argued November 17, 1959. Decided July 11, 1960.)

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Before SOBELOFF, Chief Judge, and SOPER and HAYNESWORTH, Circuit Judges.

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SOBELOFF, Chief Judge:

Once again, as in *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir., 1959), this court is faced with a problem arising from a manufacturer's refusal to continue selling a dealer because of the latter's failure to accede to the seller's wishes with regard to

products carried. This time the question arises in the context of the petroleum industry, and the particular issue is whether there existed between the Sinclair Refining Company and its customers an illegal tying arrangement prohibited by section 1 of the Sherman Act, 15 U. S. C. A. section 1. *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1 (1958). In its opinion, the District Court set out in detail the facts of this case, and, as those findings are not contested on this appeal, we are concerned only with the legal conclusion to be drawn from them.

Sherwood Bros., Inc., formerly an independent distributor of petroleum products in Maryland, became, in 1935, a wholly owned subsidiary of Sinclair, selling Sinclair products in Maryland and in some areas of adjacent states. In 1955, it was merged with Sinclair. Either name will hereafter be used to refer to the defendant. The plaintiff, Osborn, operated a filling station in Maryland carrying Sinclair petroleum products from 1936 to 1948, as an independent dealer under a lease and sales agreement with Sinclair-Sherwood. In the latter year, his lease was terminated and a new lease was entered into which continued until May 31, 1956, when it was cancelled by Sinclair. One of the reasons for the second cancellation and the present litigation was that the plaintiff failed to purchase sufficient quantities of Goodyear Tires, Batteries and Accessories (TBA).

Soon after Sherwood became a subsidiary of Sinclair in 1935, it entered into oral agreements with the Goodyear Tire and Rubber Company under which Sherwood received a commission from Goodyear in connection with the sale of Goodyear products to Sherwood dealers. The Sherwood-Goodyear agreement was reduced to writing in 1944. According to its terms, Sherwood agreed to "actively assist" Goodyear in "selling and in promoting the sale" of Goodyear TBA to Sherwood's dealers, and in return, Goodyear was to pay Sherwood a 10% commission on tires

and batteries sold to Sherwood's dealers and commissions of 5% to 10% on car and home merchandise. Also in 1944, Sinclair and Goodyear entered into similar written agreements. There were further details in the contracts, set out in the District Court's opinion, concerning the methods by which orders were taken, adjustments for defective merchandise, billing, collecting, etc.

Because of its financial interest in having its lessee-dealers sell Goodyear TBA rather than competing brands, Sinclair-Sherwood engaged in a course of conduct designed to bring about this result. The facts in this case utterly fail to reveal any other business motive for the defendant's policy that its dealers should handle Goodyear products instead of others. Admittedly, it was proper for Sinclair-Sherwood to desire its lessees to carry a complete, high quality line of TBA. It is conceded, however, that there were other competing brands, and there is no suggestion that Goodyear was superior to other brands of TBA or that there was any benefit to the dealers in handling Goodyear rather than one of the other lines. The plaintiff, in addition to being a lessee of a Sinclair filling station, also operated a Firestone store in a nearby town where he sold that company's TBA. At his filling station, he carried both Goodyear and Firestone TBA, telling Sinclair-Sherwood that he would handle both and let the public choose between them. Firestone, however, remained his major line, and this was responsible, partly at least, for his troubles.

The District Court, after considering all of the evidence presented, concluded that the plaintiff had failed to prove a violation of the anti-trust laws, and gave judgment for the defendant, Sinclair-Sherwood. In this appeal, the plaintiff asserts (1) that his service station lease and dealer sales agreement were cancelled by Sinclair in furtherance of an attempt to monopolize the sale of TBA, (2) that the contracts between Sinclair-Sherwood and Goodyear constituted unreasonable restraints of trade, and violated sec-

tion 1 of the Sherman Act,[1] and (3) that the sale of Goodyear TBA to Sinclair-Sherwood dealers was in furtherance of an illegal restraint of trade under the anti-trust laws.

Although it was shown that the sale of gasoline by Sinclair-Sherwood in Maryland constituted slightly more than 10% of the total sale of gasoline sold in that state during the years immediately prior to the cancellation of the plaintiff's dealership, and that there were in this period about 300 Sinclair service stations out of a total of about 2300 service stations in Maryland, the District Judge pointed out that, with regard to TBA, the plaintiff had failed to prove any intent to monopolize or to demonstrate that the economic effects of the agreements between Sinclair-Sherwood and Goodyear were such that those agreements themselves involved an unreasonable restraint of trade. As to the plaintiff's remaining contention, the court concluded that there was in this case no unreasonable per se restraint of trade, such as existed in *Standard Oil Company of California* v. *United States*, 337 U. S. 293 (1949) (primarily involving exclusive dealing), and in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947) and *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1 (1958)

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[1] It is interesting to note that this same type of contract between oil companies and manufacturers of TBA is presently under attack before the Federal Trade Commission. See the initial decisions filed October 23, 1959, in: *In the Matter of B. F. Goodrich Company and The Texas Company*, Docket No. 6485; *In the Matter of The Goodyear Tire & Rubber Company and The Atlantic Refining Company*, Docket No. 6486; and *In the Matter of The Firestone Tire & Rubber Company and Shell Oil Company*, Docket No. 6487. The complaints, in those cases, attacked both the agreements between the oil and rubber companies and also the alleged coercion by the oil companies in forcing their dealers to handle certain sponsored brands of TBA. The hearing examiner upheld the contracts between the oil and rubber companies against the charge of unreasonably restraining trade. The examiner, however, did find that the gasoline dealers were coerced and forced to buy substantial quantities of the specified brands of TBA, and ordered them to cease and desist from such coercion and from threatening to cancel leases unless the dealers purchased the sponsored TBA products.

(concerned with tie-ins). The court found, however, that if such a tying arrangement had existed, "the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce," so as to make the per se classification of unreasonableness applicable. Because of the view we take of this case, it will be necessary to deal in detail with this last issue only.

Under the findings of the District Court, not disputed on this appeal, it is clear that an illegal tie-in arrangement existed between Sinclair-Sherwood and its dealers. Many of the findings demonstrate the pressure exerted against the Sinclair dealers to carry Goodyear TBA rather than competing brands. The District Judge observed that Sinclair-Sherwood "was not pleased when its dealers carried a large stock of other TBA products," and that, when Sinclair-Sherwood signed prospective lessees

> "[t]he normal procedure was to sign the lease and dealer sales agreement and to secure the initial TBA order simultaneously. Sherwood impressed on its sales personnel the desirability of dealers carrying 100% Goodyear TBA products. They, in turn, used their best efforts to persuade the dealers to purchase Goodyear TBA in preference to other lines."

Of course, a seller may attempt to persuade a buyer to purchase his products rather than those of his competitors, and such salesmanship efforts do not run afoul of the antitrust laws, unless the sale of one product (the tying product) is made under an agreement, arrangement or condition under which the buyer must also purchase another (the tied) product. The findings compel the legal conclusion that such an agreement, arrangement or condition existed, and that if a dealer desired to continue selling Sinclair gasoline under the lease and sales agreements, he had no choice but to buy, as well, substantial quantities of Goodyear TBA.

*Appendix B.*

At sales meetings held every spring, the dealers were warned by the president of Sherwood that he was dissatisfied with their Goodyear TBA sales. With regard to one meeting in 1949, the District Judge said: "I find that the dealers understood and Sherwood intended them to understand that unless they purchased more Goodyear TBA some of the leases would be terminated." In 1950, Sinclair-Sherwood set as a goal $1,000,000 of TBA sales and "calculated that $35 of TBA sales per 1,000 gallons of gasoline sales was a reasonable quota."

The court also found that: "Sherwood kept records of the purchases of Goodyear TBA by its dealers and considered this item along with others in determining whether to renew or terminate a dealer's lease at the end of each year." The above findings demonstrate that Sinclair-Sherwood's efforts to induce their dealers to carry a substantial quantity of Goodyear TBA went beyond mere persuasion or salesmanship to effectuate Sinclair-Sherwood's policy and constituted an actual requirement and condition for the continued sale of gasoline under their leases.

Although, standing alone, the above general findings do not, perhaps, disclose a tie-in accomplished by express agreement with the dealers, such an express contract is not necessary. In *McElhenney* v. *Western Auto Supply Co.*, 269 F. 2d 332, 338 (4th Cir., 1959), this court pointed out:

> Probably nothing is more firmly settled in our anti trust jurisprudence than that an illegal contract may be inferred from all of the circumstances. Admittedly, the written agreement between the parties contains no provision requiring the franchises to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found. . . ."

In that case we found the pleadings deficient because they failed to allege sufficient facts to constitute such an illegal tying arrangement. We remanded the case to give the plaintiff an opportunity to amend his pleadings to allege such an agreement, if he properly could.

In the instant case, however, more is revealed than an inferred illegal arrangement through a course of conduct. With regard to the cancellation of the plaintiff's first lease in 1948 and the signing of his second lease, the termination of which gave rise to the present controversy, the District Judge found:

> "His first lease was cancelled by Sherwood in 1948 because of the decline in the gasoline gallonage and because plaintiff was not handling enough Goodyear TBA products. Following a conference, at which plaintiff had agreed to place an order for over $1,000 worth of Goodyear TBA, Sherwood's sales manager decided to give him another chance and signed a new lease. Plaintiff thereafter bought some Goodyear TBA, but he continued to buy more than ten times as much Firestone TBA."

From this it clearly appears that the plaintiff's second lease, the cancellation of which occurred in 1956, was actually made in pursuance of an express oral agreement to purchase Goodyear TBA.

As to the termination of the second lease, the judge concluded that both the plaintiff's failure to sell sufficient gasoline and his refusal to purchase more Goodyear TBA contributed to Sinclair-Sherwood's decision to cancel, neither of the two factors being predominant. The District Judge correctly pointed out that such combination of factors would not defeat the plaintiff's claim as long as the illegal motive substantially contributed to the decision to cancel. See: *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Momand* v. *Universal Film Exchange, Inc.*, 172 F. 2d 37 (1st Cir., 1948).

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Despite the above findings of fact, and the further finding that the volume of TBA purchases by Sinclair-Sherwood dealers constituted a not insubstantial amount of commerce, the District Court held that the plaintiff had failed to prove an illegal per se tying arrangement. The court apparently predicated its legal conclusion upon the fact that there was no unreasonable per se restraint of trade in the written contracts with the dealers or in the agreements between Sinclair-Sherwood and Goodyear and that Sinclair-Sherwood did not require the dealers to carry Goodyear TBA exclusively. Having reached the conclusion that there was no per se violation the District Judge held that, in order for the plaintiff to recover, it was necessary for him to show that the public had been injured by the manner in which the business had been carried on under the agreements; and the District Judge then found that the plaintiff had failed to prove such injury and therefore no violation of the antitrust acts had been shown.[2] As pre-

[2] The court stated:

> "If there were such a restraint of trade or attempt to monopolize as existed in *International Salt Co.* v. *United States*, 332 U. S. 392; *Standard Oil Company of California* v. *United States*, 337 U. S. 293, and *Northern Pacific Railway Co.* v *United States*, *supra*, the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce. In those three cases, however, there was a clear restraint of trade or attempt to monopolize, apparent from the provisions of the written contracts themselves. No such per se violation is apparent in the present case, for neither the letter-contracts between Sherwood-Sinclair and Goodyear nor the agreements between Sherwood and its dealers contain any similar provisions. Any possible intent to monopolize or to unreasonably restrain trade in this case must be gleaned from the way in which the agreements were used."

And later.

> "Since there was no per se violation of the antitrust laws, plaintiff had to prove facts which show public injury from the alleged attempt to monopolize. . . . The keen competition between suppliers for the service station business prevents control of wholesale prices by the Sinclair-Goodyear

viously noted, however, an agreement, arrangement, or condition which unreasonably restrains trade in itself by price fixing, boycotts, or tie-ins, need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct. *United States* v. *Parke, Davis and Company*, 362 U. S. 29 (1960); *McElhenney* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir., 1959). In addition, the plaintiff's second lease seems to have been entered into under the express oral agreement that he would purchase substantial quantities of Goodyear TBA. A tying arrangement does not have to be in writing to be illegal but may be oral.

Nor do we think a tie-in escapes condemnation as an unreasonable per se restraint of trade because the buyer is not obligated to obtain all his requirements of the tied product from the seller. Although none of the cases brought to our attention has discussed this specific question in a similar factual context, to insist upon such exclusivity in a tie-in would be inconsistent with the trend of the decisions in this area. If a substantial amount of commerce is restricted by such arrangements, the standard for illegality would seem to have been met. Tying arrangements are:

> ". . . unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition

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arrangement. There is no evidence in this case of any horizontal price fixing agreements between any of the tire companies or any of the oil companies with respect to TBA. Nor is there any suggestion of 'price leadership' in the TBA business in Maryland. The public has a choice of brands at Sinclair stations, and is free to buy any of the competing brands at service stations operated by other companies and at all sorts of other retail outlets. The Goodyear TBA products compete with those of other manufacturers and distributors on the basis of price, quality and all other relevant factors. Plaintiff has failed to prove any injury to the public from the Sinclair-Goodyear marketing arrangement."

in the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pac. R. Co.* v. *United States, supra,* at page 6.

The economic effect of the tying arrangement, not the degree of exclusivity, is the pertinent issue. It is not disputed in the present case that Sinclair, with more than 10% of the gasoline sales and stations in the state of Maryland, has sufficient power in the tying product to appreciably restrain competition in the tied product, TBA. The finding that a not insubstantial amount of commerce is affected is not questioned on this appeal.

In *International Salt, supra,* involving contracts requiring lessees of the defendant's machines to use in them only salt purchased from the defendant, the argument was made that the agreements were lawful because the lessee was permitted to purchase a competitor's salt if obtainable at a lower price. While observing that this provision did "afford a measure of protection to the lessee," 332 U. S. at pages 396-397, the Court went on: "but it does not avoid the stifling effect of the agreement on competition." Likewise, in *Northern Pacific,* 356 U. S. at pages 11-12, it was argued that the tie-in agreements "are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition." This contention did not avail the defendant, as the Court replied that the tying arrangements did "deny defendant's competitors access to the fenced-off market on the same terms as the defendant." Also supporting the view that to be unlawful a tying arrangement need not completely cut off the buyer's access to competing products, are the cases concerning tie-ins of a seller's product to a particular machine supplied by the seller, even where the buyer was not forbidden to use competing products in like machines obtained elsewhere. See: *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48 (4th Cir., 1942); *Judson*

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*L. Thompson Mfg. Co.* v. *Federal Trade Com'n.*, 150 F. 2d 952 (1st Cir., 1945), cert. den. 326 U. S. 776

A tying agreement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Northern Pac. R. Co.* v. *United States, supra*, 356 U. S. at page 5. In other words, the law has been violated if the defendant compels the plaintiff to purchase a quantity of one product when the plaintiff seeks to buy another, the desired product. It is the restrictive nature of the agreement, not the fact of exclusivity, which is objectionable.

Turning to the instant case, having substantial quantities of Goodyear TBA clearly appears to have been a condition of the plaintiff's leasing the service station and being a dealer in Sinclair gasoline. The Goodyear TBA was tied to the lease and the sale of the gasoline. It matters not that the plaintiff was not forced to purchase his entire requirements in Goodyear merchandise. Certainly, insofar as he and other dealers were compelled to carry Goodyear, to that extent competition in TBA was curbed.

Sinclair argues that its conduct constituted merely a refusal to deal, sanctioned under the principal that a trader may select his customers as he sees fit. With this general principle, we have no quarrel. Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or combination, refuse to deal with a purchaser in accordance with the announced policy. *United States* v. *Colgate & Company*, 250 U. S. 300 (1919). In the latter situation, however, the manufacturer's right of refusal has been severely limited. If he goes beyond the mere announcement of policy

and refusal to deal with those not adhering to it, his course of conduct may constitute a forbidden agreement, combination, or arrangement to effectuate such policy. As the Court in *Parke, Davis* recently pointed out:

> "... an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 362 U. S. at page 43.

And later:

> "So long as Colgate is not overruled, this result [the economic effect of the manufacturer's policy] is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to the parties with whom he will deal.' When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. ..." 362 U. S. at page 44.

In the present case, it is clear from the findings of fact that Sinclair-Sherwood's conduct went beyond a mere announcement of policy and refusal to deal. As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement to buy Goodyear TBA, made after the cancellation of the plaintiff's first lease, in order

for the plaintiff to be restored as a gasoline dealer. This case is not within the *Colgate* doctrine. Moreover, it is no distinction to say that *Parke, Davis* was concerned with price fixing whereas here we have a tie-in. Both price fixing and tie-ins affecting a not insubstantial amount of commerce, are illegal per se. By relying on *Colgate*, the defendant in fact admits that the same principles concerning refusals to deal are applicable to both tying arrangements and price fixing, for *Colgate* itself was a price fixing case.

The Supreme Court's observation in *Standard Stations*, 337 U. S. at page 305, that "tying agreements serve hardly any purpose beyond the suppression of competition" applies with full force to the present case. The perniciousness of the imposed tie-in is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing his economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power.

We need not discuss the defendant's various arguments focusing upon the absence of proof of monopoly in the defendant or that the contracts between Sinclair-Sherwood and Goodyear were not, according to the "rule of reason," violative of the Sherman Act. These arguments are beside the point. We have here a tying arrangement between Sinclair and its dealers, found to affect a substantial part of commerce, solely for the defendant's economic benefit and not justified by the nature of the products. This is unreasonable per se, *Northern Pac. R. Co. v. United States*, *supra*. If, as the Supreme Court has said, "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived

and whether the power takes the form of a monopoly or not,"[3] the vice is well illustrated by this case.

While we conclude that an illegal arrangement or condition existed between Sinclair-Sherwood and its dealers and that Osborn's failure to abide by this arrangement or condition contributed to the cancellation of his lease, there are questions concerning Osborn's recoverable damages. On this point the District Judge said:

> "Plaintiff suffered damages as a result of the cancellation but it was agreed at a pretrial conference that no proof of the amount of such damage should be offered until after it has been determined whether there was any violation of the antitrust laws. Plaintiff did not prove that he suffered any other damage as a result of the alleged violations."

Since Sinclair-Sherwood had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable as damages resulting from the violation of the anti-trust laws. See, however, *Enrich Motors* v. *General Motors*, 340 U. S. 558 (1951). Moreover, there is evidence in the record that Osborn had to pay more for Goodyear TBA products than for other brands which he desired.

Of course, if Osborn sustained no damages that are properly recoverable, he has no cause of action. Because of the questions inherent in this phase of the case, we think it appropriate to remand it to the District Court for further hearing, in which the parties will have full opportunity to present additional evidence on the question of damages in the period before as well as after the termination of the lease. The District Court should then determine what items, if any, are recoverable. We wish to emphasize that we are not at this time expressing or intimating any opinion on this aspect of the case.

*Reversed and remanded.*

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[3] *Northern Pac. R. Co. v. United States*, *supra*, at page 11.

*Appendix B.*

**Amended Opinion.**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

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No. 7899.

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S. KRIETE OSBORN,

Appellant,

*versus*

SINCLAIR REFINING COMPANY,

Appellee.

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(Argued November 17, 1959. Decided July 11, 1960.)

(Argument On Petition for Rehearing January 26, 1961. Petition Denied February 28, 1961.)

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Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

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SOBELOFF, Chief Judge.

Once again, as in *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir., 1959), this court is faced with a problem arising from a manufacturer's refusal to continue selling a dealer because of the latter's failure to accede to the seller's wishes with regard to

products carried. This time the question arises in the context of the petroleum industry, and the particular issue is whether there existed between the Sinclair Refining Company and its customers an illegal tying arrangement prohibited by section 1 of the Sherman Act, 15 U. S. C. A. section 1. *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1 (1958). In its opinion, the District Court set out in detail the facts of the case, and, as those findings are not contested on this appeal, we are concerned only with the legal conclusion to be drawn from them.

Sherwood Bros., Inc., formerly an independent distributor of petroleum products in Maryland, became, in 1935, a wholly owned subsidiary of Sinclair, selling Sinclair products in Maryland and in some areas of adjacent states. In 1955, it was merged with Sinclair. Either name will hereafter be used to refer to the defendant. The plaintiff, Osborn, operated a filling station in Maryland carrying Sinclair petroleum products from 1936 to 1948, as an independent dealer under a lease and sales agreement with Sinclair-Sherwood. In the latter year, his lease was terminated and a new lease was entered into which continued until May 31, 1956, when it was cancelled by Sinclair. One of the reasons for the second cancellation and the present litigation was that the plaintiff failed to purchase sufficient quantities of Goodyear Tires, Batteries and Accessories (TBA).

Soon after Sherwood became a subsidiary of Sinclair in 1935, it entered into oral agreements with the Goodyear Tire and Rubber Company under which Sherwood received a commission from Goodyear in connection with the sale of Goodyear products to Sherwood dealers. The Sherwood-Goodyear agreement was reduced to writing in 1944. According to its terms, Sherwood agreed to "actively assist" Goodyear in "selling and in promoting the sale" of Goodyear TBA to Sherwood's dealers, and in return, Goodyear was to pay Sherwood a 10% commission on tires and batteries sold to Sherwood's dealers and commissions

of 5% to 10% on car and home merchandise. Also in 1944, Sinclair and Goodyear entered into similar written agreements. There were further details in the contracts, set out in the District Court's opinion, concerning the methods by which orders were taken, adjustments for defective merchandise, billing, collecting, etc.

Because of its financial interest in having its lessee-dealers sell Goodyear TBA rather than competing brands, Sinclair-Sherwood engaged in a course of conduct designed to bring about this result. The facts in this case utterly fail to reveal any other business motive for the defendant's policy that its dealers should handle Goodyear products instead of others. Admittedly, it was proper for Sinclair-Sherwood to desire its lessees to carry a complete, high quality line of TBA. It is conceded, however, that there were other competing brands, and there is no suggestion that Goodyear was superior to other brands of TBA or that there was any benefit to the dealers in handling Goodyear rather than one of the other lines. The plaintiff, in addition to being a lessee of a Sinclair filling station, also operated a Firestone store in a nearby town where he sold that company's TBA. At his filling station, he carried both Goodyear and Firestone TBA, telling Sinclair-Sherwood that he would handle both and let the public choose between them. Firestone, however, remained his major line, and this was responsible, partly at least, for his troubles.

The District Court, after considering all of the evidence presented, concluded that the plaintiff had failed to prove a violation of the anti-trust laws, and gave judgment for the defendant, Sinclair-Sherwood. In this appeal, the plaintiff asserts that there exists a forbidden attempt to monopolize, that the contracts between Sinclair and Goodyear constituted an illegal restraint of trade,[1] and inter-

[1] It is interesting to note that this same type of contract between oil companies and manufacturers of TBA is presently under attack before the Federal Trade Commission. See the initial decisions, filed October 23, 1959, in *In the Matter of B. F. Goodrich Company*

spersed throughout these arguments are assertions that Sinclair's coercion of its dealers fell within the ban of such tie-in cases as *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1 (1958), and *International Salt Co.* v. *United States*, 332 U. S. 392 (1947).

Although it was shown that the sale of gasoline by Sinclair-Sherwood in Maryland constituted slightly more than 10% of the total sale of gasoline sold in that state during the years immediately prior to the cancellation of the plaintiff's dealership, and that there were in this period 320 Sinclair service stations out of a total of about 2300 service stations in Maryland, the District Judge pointed out that, with regard to TBA, the plaintiff had failed to prove any intent to monopolize or to demonstrate that the economic effects of the agreements between Sinclair-Sherwood and Goodyear were such that those agreements themselves involved an unreasonable restraint of trade. As to the plaintiff's remaining contention, the court concluded that there was in this case no unreasonable per se restraint of trade, such as exisfed in *Standard Oil Company of California* v. *United States*, 337 U. S. 293 (1949) (primarily involving exclusive dealing), and in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947) and *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1 (1958) (concerned with tie-ins). The court found, however, that

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*and The Texas Company*, Docket No. 6485; *In the Matter of The Goodyear Tire & Rubber Company and The Atlantic Refining Company*, Docket No. 6486; and *In the Matter of The Firestone Tire & Rubber Company and Shell Oil Company*, Docket No. 6487. The complaints, in those cases, attacked both the agreements between the oil and rubber companies and also the alleged coercion by the oil companies in forcing their dealers to handle certain sponsored brands of TBA. The hearing examiner upheld the contracts between the oil and rubber companies against the charge of unreasonably restraining trade. The examiner, however, did find that the gasoline dealers were coerced and forced to buy substantial quantities of the specified brands of TBA, and ordered them to cease and desist from such coercion and from threatening to cancel leases unless the dealers purchased the sponsored TBA products.

if such a tying arrangement had existed, "the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce," so as to make the per se classification of unreasonableness applicable. Because of the view we take of this case, it will be necessary to deal in detail with this last issue only.

Under the findings of the District Court, not disputed on this appeal, it is clear that an illegal tie-in arrangement existed between Sinclair-Sherwood and its dealers. Many of the findings demonstrate the pressure exerted against the Sinclair dealers to carry Goodyear TBA rather than competing brands. The District Judge observed that Sinclair-Sherwood "was not pleased when its dealers carried a large stock of other TBA products," and that, when Sinclair-Sherwood signed prospective lessees

> "[t]he normal procedure was to sign the lease and dealer sales agreement and to secure the initial TBA order simultaneously. Sherwood impressed on its sales personnel the desirability of dealers carrying 100% Goodyear TBA products. They, in turn, used their best efforts to persuade the dealers to purchase Goodyear TBA in preference to other lines."

Of course, a seller may attempt to persuade a buyer to purchase his products rather than those of his competitors, and such salesmanship efforts do not run afoul of the antitrust laws, unless the sale of one product (the tying product) is made under an agreement, arrangement or condition under which the buyer must also purchase another (the tied) product. The findings compel the legal conclusion that such an agreement, arrangement or condition existed, and that if a dealer desired to continue selling Sinclair gasoline under the lease and sales agreements, he had no choice but to buy, as well, substantial quantities of Goodyear TBA.

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At sales meetings held every spring, the dealers were warned by the president of Sherwood that he was dissatisfied with their Goodyear TBA sales. With regard to one meeting in 1949, the District Judge said: "I find that the dealers understood and Sherwood intended them to understand that unless they purchased more Goodyear TBA some of the leases would be terminated." In 1950, Sinclair-Sherwood set as a goal $1,000,000 of TBA sales and "calculated that $35 of TBA sales per 1,000 gallons of gasoline sales was a reasonable quota."

The court also found that: "Sherwood kept records of the purchases of Goodyear TBA by its dealers and considered this item along with others in determining whether to renew or terminate a dealer's lease at the end of each year." The above findings demonstrate that Sinclair-Sherwood's efforts to induce their dealers to carry a substantial quantity of Goodyear TBA went beyond mere persuasion or salesmanship to effectuate Sinclair-Sherwood's policy and constituted an actual requirement and condition for the continued sale of gasoline under their leases.

Although, standing alone, the above general findings do not, perhaps, disclose a tie-in accomplished by express agreement with the dealers, such an express contract is not necessary. In *McElhenney* v. *Western Auto Supply Co.*, 269 F. 2d 332, 338 (4th Cir., 1959), this court pointed out:

> "Probably nothing is more firmly settled in our anti-trust jurisprudence than that an illegal contract may be inferred from all of the circumstances. Admittedly, the written agreement between the parties contains no provision requiring the franchises to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found. . . ."

In that case we found the pleadings deficient because they failed to allege sufficient facts to constitute such an illegal tying arrangement. We remanded the case to give the plaintiff an opportunity to amend his pleadings to allege such an agreement, if he properly could.

In the instant case, however, more is revealed than an inferred illegal arrangement through a course of conduct. With regard to the cancellation of the plaintiff's first lease in 1948 and the signing of his second lease, the termination of which gave rise to the present controversy, the District Judge found:

> "His first lease was cancelled by Sherwood in 1948 because of the decline in the gasoline gallonage and because plaintiff was not handling enough Goodyear TBA products. Following a conference, at which plaintiff had agreed to place an order for over $1,000 worth of Goodyear TBA, Sherwood's sales manager decided to give him another chance and signed a new lease. Plaintiff thereafter bought some Goodyear TBA; but he continued to buy more than ten times as much Firestone TBA."

From this it clearly appears that the plaintiff's second lease, the cancellation of which occurred in 1956, was actually made in pursuance of an express oral agreement to purchase Goodyear TBA.

As to the termination of the second lease, the Judge concluded that both the plaintiff's failure to sell sufficient gasoline and his refusal to purchase more Goodyear TBA contributed to Sinclair-Sherwood's decision to cancel, neither of the two factors being predominant. The District Judge correctly pointed out that such combination of factors would not defeat the plaintiff's claim as long as the illegal motive substantially contributed to the decision to cancel. See: *Stbry Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Momand* v. *Universal Film Exchange, Inc.*, 172 F. 2d 37 (1st Cir., 1948).

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Despite the above findings of fact, and the further finding that the volume of TBA purchases by Sinclair-Sherwood dealers constituted a not insubstantial amount of commerce, the District Court held that the plaintiff had failed to prove an illegal per se tying arrangement. The court apparently predicated its legal conclusion upon the fact that there was no unreasonable per se restraint of trade in the written contracts with the dealers or in the agreements between Sinclair-Sherwood and Goodyear, and that Sinclair-Sherwood did not require the dealers to carry Goodyear TBA exclusively. Having reached the conclusion that there was no per se violation the District Judge held that, in order for the plaintiff to recover, it was necessary for him to show that the public had been injured by the manner in which the business had been carried on under the agreements; and the District Judge then found that the plaintiff had failed to prove such injury and therefore no violation of the antitrust acts had been shown.[2] As pre-

[2] The court stated:

"If there were such a restraint of trade or attempt to monopolize as existed in *International Salt Co.* v. *United States*, 332 U. S. 392; *Standard Oil Company of California* v. *United States*, 337 U. S. 293, and *Northern Pacific Railway Co.* v. *United States*, *supra*, the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce. In those three cases, however, there was a clear restraint of trade or attempt to monopolize, apparent from the provisions of the written contracts themselves. No such per se violation is apparent in the present case, for neither the letter-contracts between Sherwood-Sinclair and Goodyear nor the agreements between Sherwood and its dealers contain any similar provisions. Any possible intent to monopolize or to unreasonably restrain trade in this case must be gleaned from the way in which the agreements were used."

And later:

"Since there was no per se violation of the antitrust laws, plaintiff had to prove facts which show public injury from the alleged attempt to monopolize. . . . The keen competition between suppliers for the service station business prevents control of wholesale prices by the Sinclair-Goodyear

viously noted, however, an agreement, arrangement, or condition which unreasonably restrains trade in itself by price fixing, boycotts, or tie-ins, need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct. *United States* v. *Parke, Davis and Company*, 362 U. S. 29 (1960); *McElhenney* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir., 1959) In addition, the plaintiff's second lease seems to have been entered into under the express oral agreement that he would purchase substantial quantities of Goodyear TBA. This is further evidence of the illegal course of conduct by Sinclair toward its dealers.

Nor do we think a tie-in escapes condemnation as an unreasonable per se restraint of trade because the buyer is not obligated to obtain all his requirements of the tied product from the seller. Although none of the cases brought to our attention has discussed this specific question in a similar factual context, to insist upon such exclusivity in a tie-in would be inconsistent with the trend of the decisions in this area. If a substantial amount of commerce is restricted by such arrangements, the standard for illegality would seem to have been met. Tying arrangements are:

> ". . . unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product and a 'not insubstantial' amount of

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arrangement. There is no evidence in this case of any horizontal price fixing agreements between any of the tire companies or any of the oil companies with respect to TBA. Nor is there any suggestion of 'price leadership' in the TBA business in Maryland. The public has a choice of brands at Sinclair stations, and is free to buy any of the competing brands at service stations operated by other companies and at all sorts of other retail outlets. The Goodyear TBA products compete with those of other manufacturers and distributors on the basis of price, quality and all other relevant factors. Plaintiff has failed to prove any injury to the public from the Sinclair-Goodyear marketing arrangement."

interstate commerce is affected." *Northern Pac. R. Co.* v. *United States, supra,* at page 6.

The economic effect of the tying arrangement, not the degree of exclusivity, is the pertinent issue. The facts as found by the District Court make it clear that the power of Sinclair to appreciably restrain competition in TBA stemmed from Sinclair's position as supplier of more than 10% of the gasoline sold in the state of Maryland, and as gasoline supplier to more than 10% of the stations in the state, including the station leased to Osborn. The finding was that a not insubstantial amount of commerce is affected.

In *International Salt, supra,* involving contracts requiring lessees of the defendant's machines to use in them only salt purchased from the defendant, the argument was made that the agreements were lawful because the lessee was permitted to purchase a competitor's salt if obtainable at a lower price. While observing that this provision did "afford a measure of protection to the lessee," 332 U. S. at pages 396-397, the Court went on: "but it does not avoid the stifling effect of the agreement on competition." Likewise, in *Northern Pacific,* 356 U. S. at pages 11-12, it was argued that the tie-in agreements "are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition." This contention did not avail the defendant, as the Court replied that the tying arrangements did "deny defendant's competitors access to the fenced-off market on the same terms as the defendant." Also supporting the view that to be unlawful a tying arrangement need not completely cut off the buyer's access to competing products, are the cases concerning tie-ins of a seller's product to a particular machine supplied by the seller, even where the buyer was not forbidden to use competing products in like machines obtained elsewhere. See: *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48 (4th Cir., 1942); *Judson*

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*L. Thompson Mfg. Co.* v. *Federal Trade Com'n.*, 150 F. 2d 952 (1st Cir., 1945), cert. den. 326 U. S. 776.

A tying agreement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Northern Pac. R. Co.* v. *United States*, *supra*, 356 U. S. at page 5. In other words, the law has been violated if the defendant compels his customers to purchase a quantity of one product when they seek to buy another, the desired product. It is the restrictive nature of the agreement, not the fact of exclusivity, which is objectionable.

Turning to the instant case, buying substantial quantities of Goodyear TBA clearly appears to have been a condition of the plaintiff's leasing the service station and being a dealer in Sinclair gasoline. The Goodyear TBA was tied to the lease and the sale of the gasoline. It matters not that the plaintiff was not forced to purchase his entire requirements in Goodyear merchandise. Certainly, insofar as he and other dealers were compelled to carry Goodyear, to that extent competition in TBA was curbed.

Sinclair argues that its conduct constituted merely a refusal to deal, sanctioned under the principle that a trader may select his customers as he sees fit. With this general principle, we have no quarrel. Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or combination, refuse to deal with a purchaser in accordance with the announced policy. *United States* v. *Colgate & Company*, 250 U. S. 300 (1919). In the latter situation, however, the manufacturer's right of refusal has been severely limited. If he goes beyond the mere announcement of policy

and refusal to deal with those not adhering to it, his course of conduct may constitute a forbidden agreement, combination, or arrangement to effectuate such policy. As the Court in *Parke, Davis* recently pointed out:

> "... an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 362 U. S. at page 43.

And later:

> "So long as Colgate is not overruled, this result [the economic effect of the manufacturer's policy] is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to the parties with whom he will deal.' When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. ..." 362 U. S. at page 44.

In the present case, it is clear from the findings of fact that Sinclair-Sherwood's conduct went beyond a mere announcement of policy and refusal to deal. As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement with this particular plaintiff to buy Goodyear TBA, made after the cancellation of his first lease, in order for the plaintiff to be restored as a

gasoline dealer. This case is not within the *Colgate* doctrine. Moreover, it is no distinction to say that *Parke, Davis* was concerned with price fixing whereas here we have a tie-in. Both price fixing and tie-ins affecting a not insubstantial amount of commerce, are illegal per se. By relying on *Colgate*, the defendant in fact admits that the same principles concerning refusals to deal are applicable to both tying arrangements and price fixing, for *Colgate* itself was a price fixing case.

The Supreme Court's observation in *Standard Stations*, 337 U. S. at page 305, that "tying agreements serve hardly any purpose beyond the suppression of competition" applies with full force to the present case. The perniciousness of the imposed tie-in is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing his economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power.

We need not discuss the defendant's various arguments focusing upon the absence of proof of monopoly in the defendant or that the contracts between Sinclair-Sherwood and Goodyear were not, according to the "rule of reason," violative of the Sherman Act. These arguments are beside the point. We have here a tying arrangement between Sinclair and its dealers, found to affect a substantial part of commerce, solely for the defendant's economic benefit and not justified by the nature of the product. This is unreasonable per se, *Northern Pac. R. Co.* v. *United States*, *supra*. If, as the Supreme Court has said, "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived

and whether the power takes the form of a monopoly or not,"[3] the vice is well illustrated by this case.

While we conclude that an illegal arrangement or condition existed between Sinclair-Sherwood and its dealers and that Osborn's failure to abide by this arrangement or condition contributed to the cancellation of his lease, there are questions concerning Osborn's recoverable damages. On this point the District Judge said:

> "Plaintiff suffered damages as a result of the cancellation but it was agreed at a pretrial conference that no proof of the amount of such damage should be offered until after it has been determined whether there was any violation of the antitrust laws. Plaintiff did not prove that he suffered any other damage as a result of the alleged violations."

Since Sinclair-Sherwood had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable as damages resulting from the violation of the anti-trust laws. See, however, *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951). Moreover, there is evidence in the record that Osborn had to pay more for Goodyear TBA products than for other brands which he desired.

Of course, if Osborn sustained no damages that are properly recoverable, he has no cause of action. Because of the questions inherent in this phase of the case, we think it appropriate to remand it to the District Court for further hearing, in which the parties will have full opportunity to present additional evidence on the question of damages in the period before as well as after the termination of the lease. The District Court should then determine what items, if any, are recoverable. We wish to emphasize that we are not at this time expressing or intimating any opinion on this aspect of the case.

*Reversed and remanded.*

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[3] *Northern Pac. R. Co.* v. *United States*, *supra*, at page 11.

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## ON PETITION FOR REHEARING

Sinclair's petition for rehearing complained, preliminarily, that the grounds upon which this case was decided by us were not presented to or considered by the District Court and not raised, briefed and argued in this court. We find no merit in this complaint, but we set the motion for argument and the case has again been fully and vigorously argued on the merits. The contentions made are sufficiently dealt with in the above opinion, and we deem further elaboration unnecessary, except to answer Sinclair's insistence that as the record stands there is no evidence of its sufficient economic power to appreciably restrain commerce in TBA.

Specific findings, properly supported, were made as to Sinclair's economic power in Maryland. Over 10% of the gasoline stations in the state were Sinclair's and more than 10% of the gasoline was sold by it. There is also ample evidence of the effectiveness of this power to restrain commerce in the tied product, TBA, to a not insubstantial degree. The propriety of the Judge's finding to this effect as to the dealers generally is not contested. In *Northern Pacific*, 356 U. S. at pp. 6 and 7, it was stated:

> "Of course, where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

The standard in *Northern Pacific* is a quantitative one. Just so the seller is of sufficient size to exert some power

and the amount of commerce restrained is not insignificant, the standard is met. If all of the industry-wide economic data had to be shown for which Sinclair argues, it would convert tie-in cases to "rule of reason" cases with the requirement of public injury. When facts, as here, reveal a per se restraint of trade, it is not necessary for the plaintiff to prove, by voluminous economic data, that the public generally has been injured. *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959). What the Court in *Northern Pacific* sought to point out is demonstrated by the illustration given: it is simply that a de minimis restraint on competition would not constitute an unlawful tie-in. There must be some not insubstantial restraint. However, to make this modest showing it is not necessary to make out a "rule of reason" case. See also, for a discussion of the quantitative substantiality test, the *Standard Stations* case, 337 U. S. 293.

We reaffirm our previous holding that the record in this case discloses an unlawful restraint of trade between Sinclair and its dealers generally in Maryland. This restraint consisted of tying the sale of TBA to the lease of service stations and the sale of gasoline. If the plaintiff suffered injury as a result of this illegality, he is entitled to recovery.

*Petition for rehearing denied.*

Endorsed:

I concur:

SIMON E. SOBELOFF
U.S.C.J.

I concur:

MORRIS A. SOPER
U.S.C.J.

I concur:

CLEMENT F. HAYNSWORTH, JR.
U.S.C.J.

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**Judgment.**

Filed and Entered July 11, 1960.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

No. 7899.

S. KRIETE OSBORN,

Appellant,

*vs.*

SINCLAIR REFINING COMPANY,

Appellee.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

Filed
Jul 11 1960

R. M. F. WILLIAMS, JR.,
Clerk.